Supreme Court, U.S.
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No. 96-269

In The

Supreme Court of the United States

October Term, 1995

KOCH FUELS, INC.,

Petitioner,

v.

R. GARY CLARK, in his capacity as Tax Administrator for the State of Rhode Island,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, based upon the particular facts involved, the application of Rhode Island's Gross Earnings Tax (which was repealed in 1986) to the Petitioner violates the Commerce Clause under the first part of the four-prong test established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

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STATUTES

U.S. Const. Art. I, § 8, cl. 3

R.I. Gen. Laws § 44-41-1 *et seq.* (repealed eff. Jan. 1, 1986)

STATEMENT OF THE CASE

Petitioner challenges the imposition of a 1% tax against it by the State of Rhode Island, pursuant to the State's Gross Earnings Tax, R.I. Gen. Laws § 44-41-1 *et seq.*, (repealed effective Jan. 1, 1986). Petitioner claims that the imposition of the tax upon it violates the Commerce Clause of the United States Constitution, and urges this Court to issue certiorari to review the decision of the Rhode Island Supreme Court affirming the imposition of the tax. Specifically, Petitioner claims that it had no "presence" within the State of Rhode Island to justify imposition of the tax. Petitioner claims that the first prong of the four part test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), has not been met in this case.[1] Petitioner does not argue that any of the other three parts

[1] In that case, this Court provided that a state tax will pass Commerce Clause scrutiny when the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

of the *Complete Auto* test are at issue. Therefore, the sole question is whether there is taxable nexus sufficient to withstand Commerce Clause scrutiny.

At all relevant times, Petitioner was a Delaware corporation with its principal place of business in Wichita, Kansas. On several occasions between 1982 and 1984, Petitioner sold fuel oil to New England Power Co., the parent of Narragansett Electric Co. (hereinafter "Narragansett"). (Petitioner's Appendix, at 18).[2] The oil sold to Narragansett originated from Petitioner's depots located in Texas, Pennsylvania or Massachusetts and was shipped by common carrier (barge or vessel) F.O.B. to Narragansett's facilities in Providence, Rhode Island. (Pet.App. 19). Title, custody and risk of loss for the shipment passed between Petitioner and Narragansett "at the flange", namely, the point where the vessel's oil outflow pipe interlocks the oil terminal's inflow pipe in Rhode Island. (Pet.App. 19). The contracts of sale were negotiated and finalized out-of-state via telecommunications. (Pet.App. 19). Petitioner remained in continuous communication with the vessels while the product was in transit to insure the buyer's contract performance. (Pet.App. 24). Petitioner retained total control over the oil throughout its shipment and could stop delivery of goods in transit. (Pet.App. 23, 24).

At the time of these sales, Petitioner did not have any employees in Rhode Island, nor did it own or lease any property in this State. (Pet.App. 19). However, and very

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[2] References to Petitioner's Appendix are hereinafter designated "Pet.App."

important for determining whether the Rhode Island court was correct, Petitioner filed Rhode Island corporate tax returns for the period before, during and after the time frame at issue here. In addition, Petitioner filed annual corporate reports for the years at issue, as required by Rhode Island law. (Pet.App. 19).

On March 11, 1988, Petitioner was assessed $311,358.57 under the Petroleum Companies Gross Earnings Tax (hereinafter "Gross Earnings Tax"). R.I. Gen. Laws § 44-41-1 *et seq.* (repealed eff. Jan. 1, 1986). Petitioner made a timely request for administrative review and was granted a formal administrative hearing on August 26, 1988. On April 11, 1989, the Tax Administrator adopted the adjudication officer's written recommendation that the assessment be affirmed and issued a Final Decision and Order to that effect. (Pet.App. 1). Petitioner paid the assessment and commenced suit in the State's District Court on May 9, 1989. On December 7, 1993, the District Court affirmed the Tax Administrator's assessment. (Pet.App. 9-17). The Rhode Island Supreme Court granted certiorari, and on May 23, 1996, issued an opinion affirming the District Court, specifically finding that the Commerce Clause was not violated by the imposition of the tax. *Koch Fuels, Inc. v. Clark,* 676 A.2d 330 (R.I. 1996). (Pet.App. 18-30). The Petition for writ of certiorari was docketed in this Court on August 16, 1996.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioner's application for a writ of certiorari since the tax at issue

was repealed in 1986. Further, the decision of the Supreme Court of the State of Rhode Island does not conflict with any decision of this Court, and is not in conflict with any decision of any other State court. Finally, the Petition should be denied, since the Rhode Island Supreme Court correctly determined that, as to Petitioner, the imposition of the tax did not violate the Commerce Clause.

ARGUMENT

I. THE FACT THAT STATUTE WAS REPEALED IN 1986 MANDATES REJECTION OF THE INSTANT PETITION.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari will be granted *only* for compelling reasons. A petition is rarely granted when the asserted error consists of erroneous factual findings, as in this case. The writ should not be granted, further, since the statute which forms the basis for the tax assessment has been repealed for more than ten years, and since a determination of the correctness of the Rhode Island Supreme Court's decision would necessitate a cumbersome review of a voluminous record, which is not appropriate or warranted in this case.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), this Court took the unusual step of withdrawing a previously granted writ of certiorari *after* an opinion had been issued. The underlying case involved an action for damages following a cemetery's refusal to bury the plaintiff's non-Caucasian husband. Plaintiff had alleged

constitutional violations premised on the Equal Protection and Due Process Clauses, as guaranteed by the Fourteenth Amendment. Following an adverse decision by the Iowa Supreme Court, plaintiff sought and obtained certiorari from this Court. In due course, oral arguments were heard and an opinion adverse to the plaintiff was issued. *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880 (1955). Plaintiff petitioned for rehearing. In the interim, the statute involved in the case was amended so as to afford remedy in any similar case.

This Court granted rehearing, and dismissed the writ of certiorari, on the basis that the amended Iowa statute barred the ultimate question presented from ever arising again. In discussing why the requirement of the Rule governing certiorari (then Rule 19, now Rule 10) mandated against considering that case, this Court opined:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. (Citations omitted).

349 U.S. at 74.

In dismissing the writ, Justice Frankfurter wrote:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the . . . Courts. . . . (Citations omitted).

349 U.S. at 79.

Rhode Island's Gross Earnings Tax was repealed on June 25, 1985, to take effect on January 1, 1986. P.L. 1985, Ch. 181, Art. 25 §§ 1 and 3. There are no pending cases, either administrative or judicial, concerning the imposition of this tax. It is axiomatic that no further disputes will arise because of an imposition of this tax. This issue is no longer live, and the General Assembly has insured that the issue will not arise in the future. As discussed above, this Court has historically denied certiorari *even despite* a square conflict, in cases where a statute has been amended or repealed. *See, e.g., United States v. Abrams,* 344 U.S. 855 (1952); *Community Services, Inc. v. United States,* 342 U.S. 932 (1952); *Sokol Brothers, Company v. Commissioner,* 340 U.S. 952 (1951); *United States v. Beal,* 340 U.S. 852 (1950); *United States v. Wilkinson,* 355 U.S. 839 (1957), as described in *Berger v. United States,* 170 F. Supp. 795 (S.D.N.Y. 1959); and *United States Rubber Company v. Commissioner,* 274 F.2d 307; *cert. denied,* 363 U.S. 827 (1960). This issue thus lacks sufficient general importance to merit review by this Court.

II. CERTIORARI SHOULD BE DENIED SINCE THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT, OR OF A DECISION OF ANY STATE COURT OF LAST RESORT.

Petitioner cites to several decisions of other States' highest courts to persuade this Court to grant certiorari. Petitioner claims that the determinations in its cited cases present a square conflict with that of the Rhode Island Supreme Court. While the outcomes of these cases differ because of differing factual bases, a cursory review of these cases will show that there is no conflict between this case and any of cases cited by Petitioner.

A case cited with approval by Petitioner, *Bloomingdale's By Mail, Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), does not present a conflict, since the issue presented to the Tennessee courts was whether attorney's fees could be awarded. No facts were presented in that opinion which would assist in resolving the present controversy; rather, the single finding that "the Plaintiff is not obligated to collect or remit Tennessee use tax" seems to be the reason Petitioner cites to this case. The simple fact that the underlying dispute apparently involved use taxes cannot shed any light on the present controversy.

Similarly, Petitioner asserts a conflict between the opinion issued by the Rhode Island Supreme Court and that in *Burke & Sons Oil Company v. Director of Revenue, State of Missouri*, 757 S.W.2d 278 (Mo. 1988). That case involved a tax assessment upon a foreign business on their sale of fuel and oil to a customer in Missouri. This case points out the difficulty of determining whether a conflict exists in these very fact intensive matters. In the

Burke case, the seller, who had one place of business in Kansas, sold fuel oil to a company in Missouri. In supporting its decision that the use tax should not have been imposed upon Burke & Sons, the Missouri Court found it significant that Burke & Sons "never maintained, occupied or used any office, subsidiary, branch, place of distribution, warehouse, storage place, or other facility in Missouri and never had a representative, agent, salesperson, canvasser, or solicitor in Missouri. . . . " These facts are easily distinguished from the present matter, since Petitioner herein filed annual corporate reports, giving a business address in the State of Rhode Island before, during, and after the years in controversy, as well as filed corporate income tax returns within the State of Rhode Island before, during, and after the period in controversy. In addition, the issue of whether Burke & Sons had a taxable "nexus" was not the sole issue in the Missouri case. In this case, that is the *only* issue raised by Petitioner. The fact that the Missouri Court had alternate reasons to disallow the tax further distinguishes that case from the present matter.

In support of its argument that a conflict exists among the states, Petitioner further cites *SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St. 3rd 119, 652 N.E.2d 693 (1995). As with the prior case, the *Folio* taxpayer argued that it had no nexus or physical presence in the taxing state, i.e. Ohio. The issue was one of subsidiary/related corporation, with the potential taxpayer having no place of business within the state, nor was there evidence that they had paid corporate taxes during the time period at issue, unlike the present dispute.

The case of *Pledger v. Troll Book Clubs, Inc.*, 316 Ark. 195, 871 S.W.2d 389 (1994), involved the imposition of a use tax, but the sole issue discussed by the Supreme Court of Arkansas was that of agency. The discussion in that case does *not* assist in resolving the present dispute. Significantly, the Arkansas Supreme Court noted initially that the appellee Troll Book Clubs, Inc. was neither incorporated nor registered to do business in Arkansas. Here, the opposite is true: Petitioner filed corporate tax returns and annual corporate reports for the years in controversy. This inescapable fact differentiates it from each and every case cited in support of the argument that a conflict exists between the state.

Likewise, the brief opinion in *Department of Revenue of the State of Florida v. Share International, Inc.*, 676 So.2d 1362 (Fla. 1996) fails to shed any light on the present dispute. In that case, the taxpayer, a strictly mail order business,[3] was found to have an insufficient nexus with the State of Florida to subject it to that state's use tax. A mail order company having no business address, filing no corporate or income tax returns can certainly be distinguished from the petitioner in the present matter. Of particular note is the Florida Court's admonition that out of state vendors whose sole activities in the state are mail order sales are clearly insulated from state taxation, but if a company has additional connections to the taxing state,

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[3] Taxpayer in that case had two separate and distinct relationships with the State of Florida. The first was as a strictly mail-order business. It is in this context that the dispute arose. At some point, taxpayer sold some goods at a seminar in Florida, paying taxes on those sales without protest.

then those connections must be analyzed under the "substantial nexus" test of *Complete Auto, supra.* 1996 WL 399843, p. 2. Thus, the Florida case is not in conflict with the Rhode Island Supreme Court's decision.

There are cases which recognize that interstate business can be taxed without violating the Commerce Clause. This Court, in *D.H. Holmes Co., Ltd. v. McNamara,* 486 U.S. 24 (1988), upheld the imposition of a use tax upon a mail-order business, based upon a finding of "nexus aplenty." 486 U.S. at 33. In that case, as in this one, the element of control played a pivotal role in determining that nexus existed. In *Brown's Furniture, Inc. v. Wagner,* 665 N.E.2d 795 (Ill. 1996), a Missouri furniture retailer who neither owned any property nor had employees in Illinois was held to be subject to Illinois use tax on articles of furniture it sold and delivered into that state from its store. Brown delivered items on its own trucks into Illinois and sales in that state constituted approximately 30% of its trade. Brown advertised extensively in Illinois media outlets and made use of Illinois courts on at least one occasion.

The Illinois Supreme Court examined the facts of the *Brown* case in light of this Court's decision in *Quill Corporation v. North Dakota,* 504 U.S. 298 (1992), to determine if there was a "substantial nexus" under the Commerce Clause. 665 N.E.2d 801-802. Although *Quill* indicated that the "slightest" physical presence within a state will not serve to establish substantial nexus, 504 U.S. at 315, n.8, the Illinois Court declined to adopt the taxpayer's position that *Quill* mandated "substantial physical presence". 665 N.E.2d at 802. The Illinois Court cited with approval the decision in *Matter of Orvis Co., Inc. v. Tax Appeals*

Tribunal of the State of New York, 654 N.E.2d 954 (N.Y. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 518 (1995) (discussed *infra*), as clearly setting forth the applicable standard, and indicated that after this Court clarified in *Quill* that physical presence under the Due Process Clause is not required for tax nexus, the case of *Miller Brothers v. Maryland*, 347 U.S. 340 (1954) is questionable legal authority on tax nexus. *Id.* at 803.[4]

In *Matter of Orvis, supra*, the New York Court of Appeals held that two Vermont mail order retailers were subject to the New York use tax on their sales in that state. Both taxpayers sent employees intermittently into New York to resolve customer problems, solicit sales, and instruct customers on product use. Delivery of sold goods was accomplished by common carrier and U.S. mail. In its decision, the New York Court extensively surveyed this Court's jurisprudence on the issue of sales and use tax nexus and reached two conclusions: First, that the substantial nexus prong of *Complete Auto* does not equate to substantial physical presence of personnel or property

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[4] In that case, relied upon by the Petitioner, a Delaware furniture store occasionally delivered goods in its own trucks to Maryland customers. This Court held that Maryland's use tax did not apply to these sales on Due Process grounds. In *Quill*, this Court clarified the distinction between the Due Process standard and the Commerce Clause standard for state tax nexus. It also held that the Due Process tax nexus standard is coextensive with the current Due Process *in personam* jurisdiction standard. Thus, *Miller* is legally distinguishable. It is also factually distinguishable from the present case in that there was no registration or filings with Maryland, and Miller Brothers conducted no intentional or purposeful solicitation of trade within Maryland.

within a state. Second, that while a physical presence of a vendor is required, it need not be substantial, but must be demonstrably more than the slightest presence. It may be manifested by the presence in the taxing state of the vendor's property or the conduct of economic activities in the taxing state by the vendor's personnel on its behalf. 654 N.E.2d at 959.

In *Matter of Sales or Use Tax Liability of Webber Furniture*, 290 N.W.2d 865 (S.D. 1980), the South Dakota Supreme Court upheld the imposition of use tax upon a Nebraska furniture retailer who neither had offices nor employees within the state. That Court found there was sufficient nexus between South Dakota and the Nebraska retailer because the retailer derived substantial revenues from South Dakota, appealed directly to South Dakota residents by utilizing local advertising, regularly effected delivery of its goods in its own trucks, and was aware that the merchandise was destined for use in South Dakota when it agreed to make said deliveries. 290 N.W. 2d at 868-869. This is precisely the factual scenario we are confronted with in the present matter. Although the carriers involved in the case *sub judice* were technically "common carriers", their entire shipment consisted of Petitioner's oil.

In *Good's Furniture v. Iowa State Bd. of Tax*, 382 N.W.2d 145 (Iowa 1986), *cert. denied*, 479 U.S. 817 (1986), the Iowa Supreme Court upheld the assessment of a use tax against an Illinois retailer of home furnishings whose business was located 55 miles away from the state border. That court found a nexus because the retailer directly solicited a large volume of its Iowa sales by intensive television advertising and regularly serviced its Iowa customers by providing free delivery in its own trucks. 382

N.W.2d at 150. This Court declined to issue certiorari in 1986.

In *Cooey-Bentz Co. v. Lindley*, 419 N.E.2d 1087 (Ohio 1981), the assessment of Ohio's use tax against a West Virginia furniture and appliance retailer was upheld. In finding sufficient nexus, that Court noted that the retailer regularly enjoyed the benefit of Ohio roads and police protection when making deliveries, installations and repairs in that state with company-owned vehicles. 419 N.E.2d at 1088. Likewise, a Vermont Court upheld the imposition of the use tax against a New Hampshire retailer of furniture and carpets in *Rowe-Genereux, Inc. v. Vt. Dept. of Taxes*, 411 A.2d 1345 (Vt. 1980). That Court held that where the retailer used Vermont roads in making its deliveries, Vermont media in its advertising, and the Vermont judicial system in its business dealings, sufficient contact existed to constitutionally sustain the assessment. 411 A.2d at 1350.

These cases indicate that there is ample authority, both before and after *Quill*, upholding the taxation of sales by out-of-state vendors on facts similar to the matter at bar. Contrary to the Petitioner's assertions, the physical presence for a finding of substantial nexus does *not* mean a substantial or permanent presence. In conclusion, the State of Rhode Island submits that the decision of the Rhode Island Supreme Court in this matter does not conflict with any decision of this Court, or of any of our sister States. This Court should not conduct an exhaustive factual review simply because the Petitioner balks at paying a 1% tax. Therefore, for this reason alone, certiorari should be denied.

III. THE SUPREME COURT OF THE STATE OF RHODE ISLAND WAS CORRECT IN FINDING NO COMMERCE CLAUSE VIOLATION.

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Even where Congress has not acted affirmatively to protect interstate commerce, the Clause prevents States from discriminating against that commerce. The "distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or construct the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949).

During the years in question (1982-1984), the Gross Earnings Tax provided, in pertinent part, as follows:

> (a) a petroleum company shall pay an annual tax at the rate of 1% of the gross earnings in such calendar year derived by such company from sales of its products in this state . . . each company shall, on or before the 15th day of March of each year, render to the tax administrator under oath . . . a return on forms prescribed or furnished by the tax administrator, including in respect to such company the amount of gross earnings from sales of its products within this state for the year ending with the last day of the preceding year. The tax imposed under this act shall be in addition to

any other tax imposed by Rhode Island with respect to which such company is liable.

(b) "[G]ross earnings" are those earnings from sales of its tangible personal property (inventory sold in the ordinary course of business) where shipments are made to points within the state. . . . "Gross earnings" does not include those earnings from sales to out of state customers for marketing, distribution or consumption outside the state.

"[P]etroleum company" means every corporation, partnership, individual or other entity, formed for or engaged in the business of importing or causing to be imported by a person other than a petroleum company subject to tax under this section into this state for sale in this state, extracting, producing, refining, manufacturing, or compounding petroleum. However, to prevent multiple application of the tax . . . gross earnings shall not include the earnings from any sale for resale to a purchaser which is a petroleum company subject to tax under this chapter. It shall be presumed that no earnings are earnings from a sale for resale unless . . . (the) . . . purchaser furnished the petroleum company with a resale certificate in such form and under such terms as the tax administrator prescribed. As used in this section, the term "corporation" shall have the same meaning as set forth in Section 44-11-1(a).

The sole issue forwarded by Petitioner is that it had no permanent physical presence in the State of Rhode Island and therefore the imposition of the Gross Earnings

Tax was unconstitutional.[5] The seminal cases were discussed by the Rhode Island Supreme Court in its finding that Petitioner was constitutionally subject to the tax. *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967); *Complete Auto, supra*; and *Quill, supra*. A close examination of these three cases together with the Rhode Island Supreme Court's application of the same mandate denial of the instant petition.

Bellas Hess involved a mail order house incorporated in Delaware with its principal place of business in Missouri. The State of Illinois sought to impose use taxes on Bellas Hess' sales into that state. This Court invalidated the imposition of the tax on Commerce Clause grounds since the seller's only connection with Illinois was by common carrier or mail. One determining factor was the fact that the out of state seller was not accorded the protection or services of the taxing state. In striking down the imposition of the tax as unconstitutional, Justice Stewart recognized that "the very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements." *Id.* at 760. *Bellas Hess* forbids the imposition of use taxes on purchases of goods from a company whose *only connection* with the taxing state is by mail or by common carrier. *See also, National Geographic Society v. California Bd. of Equalization,*

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[5] While the Rhode Island Court noted that "the District Court, in its decision rendered on December 7, 1993, characterized the tax at issue as a sales or use tax", 676 A.2d 332 (Pet.App. 21), the District Court's opinion is silent as to any such characterization. The Tax Administrator disagrees with equating the Gross Earnings Tax with a use tax, but this should not affect the necessity of the denial of certiorari in this case.

430 U.S. 551 (1977) (affirming the continuing vitality of *Bellas Hess'* sharp distinction between mail-order sellers with a physical presence in the taxing State and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.)

This Court's decision in *Complete Auto, supra,* established the four part test to be used in determining whether a tax is valid under the Commerce Clause. In that case, Mississippi imposed a tax on the taxpayer's business of in-state transportation of motor vehicles manufactured outside the State. This Court provided that a state tax will pass Commerce Clause scrutiny when the "tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state." 430 U.S. at 279. *Complete Auto* also recognized that, with certain restrictions, interstate commerce must pay its own way. 486 U.S. at 30. *See also, Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981) ("It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business") (internal quotation marks and citation omitted).

In *Quill,* this Court was asked to reconsider its holding in *Bellas Hess,* in light of subsequent developments in Due Process jurisprudence and direct marketing (i.e., mail order) sales practices. *Quill* involved an out-of-state mail order house with neither outlets nor sales representatives in the taxing state, who took issue with the requirement that it be made to pay use tax on goods

purchased for use in the State. This Court in *Quill* reaffirmed the holding of *Bellas Hess*: that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the substantial nexus required by the Commerce Clause. However, in doing so, this Court made two salient points. First, in refusing to overrule the "bright-line" rule of physical presence set forth in *Bellas Hess*, this Court made it clear that it was motivated principally by the concerns of *stare decisis*; the encouragement of settled expectations for businesses, the substantial reliance that *Bellas Hess* had engendered in the mail order industry, and fostering stable orderly development of the law. 504 U.S. at 316. This Court also expressed concerns that overruling *Bellas Hess* might generate further litigation regarding retroactive tax application and expose mail order houses to "substantial unanticipated liability." 504 U.S. at 318, n. 10. It was also emphasized that since the issue of sales tax nexus was now clarified as being governed by the Commerce Clause rather than by the Due Process Clause, Congress was now free to overrule *Bellas Hess* prospectively by legislation, and that *stare decisis* has particular force when Congress remains free to alter the Court's rulings. 504 U.S. at 319. (J. Scalia, Kennedy & Thomas, concurring opinion).

Second, this Court made it abundantly clear that if the issue of sales tax nexus had been one of first impression or if the contested taxes had not been sales and use taxes, the Court would not necessarily adopt a "bright-line" physical presence test for determining tax nexus. At one juncture, this Court stated:

> *While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to*

> *arise for the first time today, Bellas Hess* is not inconsistent with *Complete Auto* and the recent cases.

504 U.S. at 311.

In a similar vein, this Court noted:

> [A]lthough our *Commerce Clause jurisprudence now favors more flexible balancing analysis,* we have never intimated a desire to reject all established "bright-line" tests. *Although we have not in our review of other taxes, articulated the same physical-presence that Bellas Hess established for sales and use taxes* that silence does not imply repudiation of the *Bellas Hess* rule.

504 U.S. at 314. (Emphasis added).

This Court then explained that "notwithstanding the benefits of bright-line tests, *we have in some situations, decided to replace such tests with more contextual balancing inquiries.*" 504 U.S. at 316. (Emphasis added). The Court then summed up:

> [A]lthough *in our cases subsequent to Bellas Hess and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement,* our reasoning in those cases does not compel that we now reject the *rule that Bellas Hess established in the area of sales and use taxes.*

504 U.S. at 316. (Emphasis added).

Thus, a close reading of *Quill* reveals that this Court reaffirmed its earlier *Bellas Hess* decision, but only on the grounds of *stare decisis*. Accordingly, the physical presence requirement for nexus applies only for sales and use

taxes. With regard to other taxes, a flexible and contextual balancing analysis is the appropriate test for determining if nexus exists. The importance of *Quill*, aside from its reconciliation of the *Bellas Hess* and *Complete Auto* decisions, was its recognition that the Commerce Clause does *not* insulate interstate commerce from paying its fair share of state taxes. 504 U.S. at 310, n.5. *Quill* also made it clear that to the extent that this Court's earlier decisions indicated that the Commerce Clause imposed a "bright-line" physical presence nexus test for all state taxes, they are overruled. 504 U.S. at 307.

The Rhode Island Supreme Court discussed all three of the above opinions to determine that Rhode Island's Gross Earnings Tax passed constitutional muster. In analyzing whether Petitioner's activities amounted to more than mere communications with its customers in the state by mail or common carrier, the Rhode Island Court noted that:

> . . . [Petitioner] shipped approximately 25.6 million gallons of oil into Rhode Island over the course of three years with a total value of approximately $18 million. It retained total control over the shipments of oil throughout delivery. [Petitioner] retained title, possession, and risk of loss over the oil up until the point it reached the flange in Providence. [Petitioner] was in continuous contact and control with both the common carrier and Narragansett and was in a position to cancel the delivery if contract performance was not met by Narragansett. Although [Petitioner] did not own the vessels that carried its fuel oil into Rhode Island,

> [Petitioner's] fuel oil represented the entire and exclusive cargo of the vessel.

676 A.2d 336 (Pet.App. 28).

In short, the Rhode Island Supreme Court correctly considered the following factors collectively in determining that Petitioner had a taxable nexus:

> – On several occasions between 1982 and 1984, Petitioner sold approximately 25.6 million gallons of fuel oil to be used at an electric generating plant in Providence, Rhode Island; (Pet.App. 18-19, 23);
>
> – Petitioner's fuel oil represented the entire and exclusive cargo of the vessel (Pet.App. 24);
>
> – These vessels brought the shipments through Narragansett Bay to the Port of Providence (Pet.App. 19);
>
> – Petitioner retained total control over the shipments of oil throughout delivery (Pet.App. 23);
>
> – Petitioner was in continuous contact and control with both the common carrier and Narragansett and was in a position to cancel the delivery if contract performance was not met by Narragansett (Pet.App. 24);
>
> – The terms of the sales contracts were F.O.B. Providence, indicating that title, possession, and risk of loss surrounding the fuel-oil shipments did not pass from Petitioner until the oil reached the outflow of the vessel, i.e., "at the flange" (Pet.App. 19, 23-24);
>
> – Petitioner registered to do business in Rhode Island in the years it sold fuel oil in Rhode Island (Pet.App. 19); and

– Petitioner paid Rhode Island corporate taxes in the years it sold fuel oil in Rhode Island (Pet.App. 19).[6]

It is interesting to note that Petitioner relegates the fact of its income tax and corporate filing during the years in question to a passing mention in a footnote. (Petition, p.14, n.4.) Petitioner dismisses the importance of the fact that it had subjected itself to Rhode Island laws with a mere wave of the hand and does not explain why this fact should be disregarded by this Court. Petitioner misleads the Court by stating in its footnote that it had established in the record that the filings were made in error, citing to its Appendix at page 16. (Petition, p.14, n.4). A review of the State District Court's opinion shows that, rather than agreeing with Petitioner that the filings were in error, did not review or address the argument that the allegedly mistaken filing of income tax returns and registration fails to establish adequate nexus. (Pet.App. 16). This blatant mischaracterization of the facts underscores the fact that certiorari should not be granted in this case.

Clearly, these factors collectively sustain a finding of a nexus with the State of Rhode Island that can withstand any Commerce Clause challenge. In addition, although

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[6] Although not mentioned in its decision, the Rhode Island Court had before it additional record evidence to support its finding of a taxable nexus in this case, i.e., the fact that Petitioner invoiced the purchaser and received payment *after* delivery, and the fact that Petitioner actively sought out, solicited and negotiated Rhode Island trade by making "cold calls" by telephone.

Petitioner challenges only the Rhode Island Court's findings relative to the first of the four-part test, the Court's opinion provides further support for a conclusion that a taxable nexus existed. In discussing the final part of the test, (the "reasonable relation" prong), the Rhode Island Court correctly noted that the considerations are similar to those under the "nexus" prong. In holding that the Gross Earnings Tax was consistent with the Commerce Clause, the Court was:

> . . . persuaded by the District Court's findings that the tax imposed on [Petitioner] is reasonably related to the services provided by Rhode Island. As the District Court correctly indicated, Rhode Island provided shipping to [Petitioner] and maintained emergency equipment in the case of an environmental disaster. The risk of an environmental disaster, and its attendant costs, are based upon the amount of oil imported into and sold in Rhode Island. We note that [Petitioner] had shipped approximately 25.6 million gallons of fuel oil into Rhode Island over the course of three years. Given the frequency of [Petitioner]'s sales in Rhode Island and the amount of fuel oil shipped into Rhode Island, [Petitioner]'s claim that it did not benefit from the services provided by Rhode Island is without merit.

676 A.2d at 335-336 (Pet.App. 28).

CONCLUSION

This Court should not grant certiorari, since the challenged statute has been repealed for more than ten years.

Further, it is clear that from the facts and law recited above that the decision of the Rhode Island Supreme Court is not in conflict with any decision of this Court or of any state court. No intercession by this Court is necessary. Finally, the Rhode Island Supreme Court correctly decided that, on the facts of this matter as applied to Petitioner, the imposition of the Gross Earnings Tax did not violate the Commerce Clause. Accordingly, this Petition should be denied.

Respectfully submitted,

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